

# EXHIBIT

## 3

# EXHIBIT

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1  
2 IN THE UNITED STATES DISTRICT COURT  
3 FOR THE DISTRICT OF DELAWARE

4 - - -

5  
6 IN RE: ADAMS GOLF, INC. :  
7 SECURITIES LITIGATION :

8  
9 ORAL DEPOSITION

10 OF

11 EDWARD NECARSULMER, III

12 Monday, August 7, 2006

13 - - -

14 Oral deposition of EDWARD NECARSULMER,  
15 III, held at the offices of SIMPSON THACHER &  
16 BARTLETT, LLP, 425 Lexington Avenue, New York,  
17 New York, commencing at 12:08 p.m., reported  
18 by Pamela Harrison, RMR, CRR, CSR and Notary  
19 Public.

20 - - -

21  
22  
23 RSA/VERITEXT COURT REPORTING COMPANY

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EDWARD NECARSULMER, III

MR. LEWIS: The stipulations that  
we have been proceeding under, as I  
understand it, are waiving, sealing,  
certification, and filing of the  
transcript, and otherwise proceeding  
under the federal rules.

MR. GLUCKOW: Give me those  
again.

MR. LEWIS: Sealing.

MR. GLUCKOW: Right.

MR. LEWIS: Certification.

MR. GLUCKOW: Okay.

MR. LEWIS: And filing.

MR. GLUCKOW: Okay.

MR. LEWIS: Some of which  
probably are already mooted by the  
latest federal rules.

MR. GLUCKOW: Right.

MR. LEWIS: And I suppose you  
want to reserve read and sign for  
Mr. Necarsulmer?

MR. GLUCKOW: Exactly. Yes.

THE WITNESS: Perfect.

---

2 (Pages 2 to 5)

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1 EDWARD NECARSULMER, III  
2 EDWARD NECARSULMER, III, after  
3 having been duly sworn, was examined  
4 and testified as follows:

5 ---

6 EXAMINATION

7 ---

8 BY MR. LEWIS:

9 Q. Would you state your name and  
10 address for the record.

11 A. Edward Necarsulmer, III, P.O.  
12 Box 1173, Quogue, Q-U-O-G-U-E, New York, 11959.

13 MR. LEWIS: As a preliminary,  
14 since there is a simultaneous  
15 deposition going on in this case in  
16 Houston today, Mr. Collins suggested to  
17 me that I pick up with numbering today  
18 at 320, leaving a gap between the end  
19 of the last deposition and his, which  
20 might result in a few blank numbers but  
21 will keep us from having two exhibits  
22 with the same number.

23 So I'm going to pick up at 320,  
24 and I'm just going to mark for the  
25 record as Exhibit 320 a document -- a

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1 EDWARD NECARSULMER, III  
2 letter from Ted McEvoy to Todd Collins,  
3 enclosing documents NECARS 1 through  
4 29.

5 (Whereupon, a document was  
6 marked, for identification purposes, as  
7 Exhibit 320.)

8 MR. LEWIS: I guess my question  
9 really is to Mr. Gluckow. Has there  
10 been any other production of documents  
11 from this witness that you are aware  
12 of?

13 MR. GLUCKOW: Yes, there was a  
14 subsequent production I think just on  
15 the heels of the rebuttal report.

16 MR. KANE: Yes.

17 MR. GLUCKOW: Ryan probably has  
18 the Bates numbers. I think it was just  
19 a half dozen more pages. We can  
20 probably get a copy for you, but I  
21 think it's NECARS 30 through 33 or 35  
22 or 37, or something like that.

23 MR. LEWIS: Somehow that seems to  
24 have slipped through the cracks. If I  
25 could see a copy of that before.

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1 EDWARD NECARSULMER, III  
2 MR. KANE: I can get it to you  
3 during the break. It was sent to  
4 Mr. Collins.

5 MR. LEWIS: Okay.

6 BY MR. LEWIS:

7 Q. Mr. Necarsulmer, my name is Don  
8 Lewis. I represent the plaintiffs in this  
9 action, and I'm going to be asking you some  
10 questions this afternoon. If I drop my voice,  
11 garble my words, let me know and I'll have the  
12 question read back to you. If I ask the  
13 question in an incomprehensible way to you, let  
14 me know and I'll reframe the question for you.

15 A. Fine.

16 Q. How did you come to be retained  
17 in this litigation?

18 A. I have worked -- I have done  
19 some prior work with the law firm, Simpson  
20 Thacher.

21 Q. Was that in the AMF Bowling  
22 litigation?

23 A. Correct.

24 Q. Have you done other work as an  
25 expert witness for Simpson Thacher?

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1 EDWARD NECARSULMER, III  
2 A. I did work as a consulting  
3 expert in a confidential matter prior to the  
4 AMF.

5 Q. A confidential matter involving  
6 due diligence?

7 A. Correct. Similar situation,  
8 just never -- it was settled.

9 Q. Is there some reason that you  
10 can't disclose the name of the client in that  
11 matter?

12 MR. GLUCKOW: Why don't I take it  
13 up with Mr. Necarsulmer. It may well  
14 be that it was a confidential  
15 engagement. My understanding is that  
16 there was no report and that it was  
17 just a consulting behind the scenes.

18 MR. LEWIS: All right.

19 BY MR. LEWIS:

20 Q. Is that your understanding as  
21 well?

22 A. That's correct.

23 Q. So have you generated expert  
24 witness reports for the Simpson Thacher firm  
25 before accepting the AMF litigation?

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EDWARD NECARSULMER, III

A. No.

MR. GLUCKOW: Object -- you've got to give me a chance just to object in general before you give your answer.

Objection to the form of the question.

You can answer.

THE WITNESS: The answer is no.

(Whereupon, documents were marked, for identification purposes, as Exhibit 321 and Exhibit 322.)

BY MR. LEWIS:

Q. Let me hand you what I'm marking as Exhibits 321 and 322. 321 is a copy of your expert report, and 322 is a copy of your rebuttal report.

Am I correct that Exhibit 321 is a copy of the expert report you rendered in this litigation?

A. Yes.

Q. And that 322 is a copy of your rebuttal report?

A. Yes.

Q. When were you retained in this

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EDWARD NECARSULMER, III

contact with Simpson Thacher in this litigation and the time you generated your first expert report, did you participate in any meetings with respect to the report?

MR. GLUCKOW: Objection to the form.

You can answer.

THE WITNESS: Yes; however, it was really after the report was written.

BY MR. LEWIS:

Q. Okay. And where was the meeting?

A. We did a conference call, a web-based conference call.

Q. Was that a type of call in which you can see each other?

A. No, it was a type of call in which you could see a document.

Q. And had you completed the final touches on your expert report by the time that web-based conference call was held?

MR. GLUCKOW: Objection to the form.

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EDWARD NECARSULMER, III

litigation, approximately?

A. I believe in April.

Q. Were you given any specific instructions with respect to putting together an expert report in this case?

A. No.

Q. What kind of guidance were you given, if any?

A. Basically to review the material, make my own determination as to how I felt about the issue to which I was going to opine. Really nothing further than that.

Q. When did you start to review the materials and to make your determination as to what you thought about them?

A. I think -- I'm not a hundred percent certain that I remember the dates I received them, but as soon as I began to get the materials, which I believe was probably in April, also.

Q. Did anyone assist you in drafting either of your reports?

A. No.

Q. Between the time of your initial

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EDWARD NECARSULMER, III

You can answer.

THE WITNESS: Yes.

BY MR. LEWIS:

Q. Who participated in that call?

A. Mr. Gluckow and perhaps one of his associates and a firm called Cornerstone, and I don't actually recall if anyone from Akin Gump was on the call or not. I think they were not on the call, so I would limit -- rephrase the answer to someone from Cornerstone and from Simpson Thacher.

(Whereupon, a document was marked, for identification purposes, as Exhibit 323.)

BY MR. LEWIS:

Q. I'll show you next what has been marked as Exhibit 323, which appears to be an e-mail from Mr. Gluckow to yourself, dated April 28, 2006.

Did you receive some version of that e-mail from Mr. Gluckow?

A. I did.

Q. The first line of the e-mail reads: "It looks like the person from Lehman

4 (Pages 10 to 13)

Page 14

1 EDWARD NECARSULMER, III  
2 will not be able to make a meeting on May 8th  
3 (and in fact will be out that entire week)."

4 What do you understand the  
5 reference to a meeting on May 8th to be?

6 A. It was a meeting to meet with  
7 the ultimate client and just to have them look  
8 me over and shake my hand.

9 Q. Was that meeting to occur before  
10 you've completed your expert witness report?

11 A. Yes.

12 Q. Would it be fair to say your  
13 expert witness report was completed on the date  
14 you signed it?

15 A. Correct.

16 Q. Did you ever attend a meeting  
17 with a person from Lehman to make the  
18 determination you referred to?

19 A. Yes.

20 Q. And when did that take place?

21 A. I don't recall the date.

22 Q. Sometime in the month of May?

23 A. Yes.

24 Q. Was the person from Cornerstone  
25 who participated in the web-based conference

Page 16

1 EDWARD NECARSULMER, III

2 Q. At the time the web-based call  
3 took place, was your expert report in exactly  
4 the same form as it now appears --

5 A. Yes.

6 Q. -- as Exhibit 321?

7 A. Yes.

8 Q. Including your signature?

9 A. No.

10 Q. So when was the report actually  
11 finished but for your signature?

12 A. Either July 10th or July 11th, I  
13 entered the date of the signature line.

14 Q. And the web-based conference  
15 call took place a month earlier?

16 A. No. Maybe a week earlier, that  
17 sort of a time period.

18 Q. Between the time of your --  
19 between the date July 12, on which your first  
20 report was signed, and the date of July 26th,  
21 2006, on which your rebuttal report was signed,  
22 did you have any meetings with anyone concerning  
23 your rebuttal report?

24 A. We had a similar conference call  
25 on the rebuttal report.

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1 EDWARD NECARSULMER, III  
2 call someone named Adel Turki?

3 A. Yes.

4 Q. Am I mispronouncing his name?

5 MR. GLUCKOW: It's Adel.

6 MR. LEWIS: Adel.

7 BY MR. LEWIS:

8 Q. Who was Mr. Turki?

9 A. He is the -- I believe he is the  
10 manager of the project, the expert project,  
11 working with Simpson Thacher.

12 Q. Did you have an understanding as  
13 to why he was participating in a web-based  
14 conference call that dealt with your expert  
15 witness report?

16 A. To the best of my knowledge, he  
17 was coordinating all the expert material and he  
18 also was the facilitator.

19 Q. Did Mr. Turki provide you with  
20 any thoughts regarding your report?

21 A. I don't believe he did.

22 Q. Did anyone from Cornerstone  
23 supply you with any materials relating to your  
24 project before you completed your report?

25 A. No.

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1 EDWARD NECARSULMER, III

2 Q. Can you recall any of the  
3 participants in the similar conference call?

4 A. I think it was a -- with the  
5 exception of the associates from Cornerstone  
6 whose name I just don't know, it would have been  
7 the same cast of characters as the first  
8 conference call.

9 Q. And do you believe there was  
10 someone from Akin Gump on that second call?

11 A. Yes.

12 Q. And who was it?

13 A. I don't know.

14 MR. LEWIS: Off the record.

15 (A discussion was held off the  
16 record.)

17 BY MR. LEWIS:

18 Q. How long did it take you to  
19 write your initial expert report?

20 MR. GLUCKOW: You mean --

21 MR. LEWIS: Drafting terms.

22 MR. GLUCKOW: So you're not  
23 including all the time he spent  
24 reviewing materials, you are just  
25 talking about sitting at the computer

5 (Pages 14 to 17)



Page 18

1 EDWARD NECARSULMER, III  
2 drafting?

3 MR. LEWIS: Drafting.

4 THE WITNESS: I mean, I would  
5 estimate between, you know, four and  
6 six hours of actual time, but my method  
7 of working is I go back at this  
8 thing -- you know, I'll write the  
9 report, I'll go back at it, I'll think  
10 about it, I might move things around a  
11 little bit, so it may have been a  
12 longer period than that, but, you know.

13 BY MR. LEWIS:

14 Q. How long had you spent reviewing  
15 the materials before you sat down to write the  
16 report?

17 A. I'm going to estimate 40-plus  
18 hours.

19 Q. Can you describe as you recall  
20 it the process you went through in reviewing the  
21 materials?

22 MR. GLUCKOW: Objection to the  
23 form.

24 You can answer.

25 THE WITNESS: I usually do it box

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1 EDWARD NECARSULMER, III  
2 by box, and what I'll do is I'll try to  
3 order the boxes, actually just in  
4 physical stack, as to the things that I  
5 want to look at again or want to, you  
6 know, give more scrutiny to. But I  
7 just go through things, documents one  
8 after another, and I try to do it for  
9 as long a period as I can and still  
10 remain able to retain the material.

11 BY MR. LEWIS:

12 Q. As you were doing that, did you  
13 make notes?

14 A. I did not.

15 Q. Did you make notations on  
16 Post-its?

17 A. No.

18 Q. You just segregated the  
19 materials that you wanted to look back at?

20 A. Yes. The only indication I  
21 would ever make is I would make a checkmark to  
22 show that I've read it, and sometimes I put a  
23 date on it to show that I've read it.

24 Q. Is there some reason that you  
25 didn't make notes on materials like that?

Page 20

1 EDWARD NECARSULMER, III

2 A. It's -- I will always -- I've  
3 been under the impression from when I've worked  
4 on these cases that that's not -- that drafts  
5 and notes are not the best things for expert  
6 witnesses to do.

7 Q. Did you receive instructions to  
8 that effect in this case?

9 A. No, no instructions in this  
10 particular case, that's just my understanding of  
11 the responsibilities.

12 Q. When you actually wrote up your  
13 report, did you use the AMF Bowling report as a  
14 template --

15 A. Yes.

16 Q. -- for the report that you were  
17 writing?

18 A. Yes.

19 MR. LEWIS: Let me just mark that  
20 as Exhibit 324.

21 (Whereupon, a document was  
22 marked, for identification purposes, as  
23 Exhibit 324.)

24 BY MR. LEWIS:

25 Q. Do you recognize this as a copy

Page 21

1 EDWARD NECARSULMER, III  
2 of an expert witness report that you generated  
3 in the AMF case?

4 A. Yes.

5 Q. I'll try to put the questions  
6 together for speed, but we'll break them apart  
7 if it becomes a problem.

8 In drafting either the expert  
9 report or the rebuttal expert report, did you  
10 create any drafts?

11 A. No.

12 Q. Before you actually -- would it  
13 be fair to say that before you actually signed  
14 either of the reports, you participated in one  
15 of these web-based conference calls in which the  
16 text of the report was shown to your -- to the  
17 attorneys who retained you before you actually  
18 signed the document?

19 MR. GLUCKOW: Can I just have  
20 that one read back? I missed the  
21 beginning.

22 (The court reporter read the  
23 record as follows:

24 "QUESTION: Before you actually  
25 -- would it be fair to say that before

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EDWARD NECARSULMER, III  
 you actually signed either of the  
 reports, you participated in one of  
 these web-based conference calls in  
 which the text of the report was shown  
 to your -- to the attorneys who  
 retained you before you actually signed  
 the document?"

MR. GLUCKOW: You can answer.

THE WITNESS: Yes.

BY MR. LEWIS:

Q. Were any changes made to either  
 of the reports after the web-based conference  
 calls?

A. The only change -- and it's true  
 of both reports -- were one of punctuation and  
 one of numbering. I can't tell you on which  
 report was which.

Q. Fair enough.

But no substantive changes?

A. Nothing of substance.

Q. So after the punctuation or  
 numbering changes were made, you edited the  
 document in whatever word processing system you  
 had, finalized it, and never had a different

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EDWARD NECARSULMER, III  
 hard copy draft?

A. No. I mean, that is correct.

Q. You never -- you had it only on  
 your screen before the final version was printed  
 out?

A. That is correct.

Q. And approximately how many hours  
 in total have you devoted to this litigation so  
 far?

A. I would have to look in my time  
 book, but right up around 60 before today.

Q. In your expert report numbered  
 321 you have listed as Exhibit B Materials  
 Considered. Can you explain what the heading  
 Materials Considered means to you?

A. Basically all the documents  
 involved in the case that I reviewed.

Q. In rendering your opinion, did  
 you consider any information from sources other  
 than the items that are listed in Exhibit B to  
 your expert report?

MR. GLUCKOW: You mean specific  
 to this litigation?

MR. LEWIS: Specific -- well --

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EDWARD NECARSULMER, III

THE WITNESS: No.

MR. LEWIS: -- of any source.

BY MR. LEWIS:

Q. Just -- I'm not trying to be  
 vague here. Did you receive any information  
 from Lehman Brothers --

A. No.

Q. -- regarding its due diligence  
 process other than what you saw in the  
 transcripts, court filings, exhibits?

A. The answer is no.

Q. And did you receive any  
 information from your -- from the counsel who  
 retained you, Simpson Thacher, about the due  
 diligence process or their views as to what had  
 happened in due diligence?

A. No.

MR. GLUCKOW: Other than what's  
 set forth in the exhibit.

THE WITNESS: I thought that was  
 the question.

BY MR. LEWIS:

Q. I'm sorry, I have a tendency to  
 try to sharpen at the end and it sometimes will

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EDWARD NECARSULMER, III  
 change the direction of the question, so you  
 will probably be better served if you wait for  
 me, and I'll try to wait for you and try not to  
 overspeak you on these questions.

Did you receive anything in the  
 nature of deposition summaries from anyone  
 related to this litigation?

A. I -- no.

Q. Did you receive any legal  
 analysis from counsel in this litigation other  
 than what may be reflected in Exhibit B?

A. No.

Q. Did anyone from Lehman Brothers  
 discuss the due diligence process with you at  
 all?

A. No.

Q. Have you, as an expert witness,  
 heard the term work product as relating to  
 lawyers?

A. Yes.

Q. Did you receive any work product  
 from your counsel in connection with your work  
 on the Adams Golf engagement?

A. No.

7 (Pages 22 to 25)



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EDWARD NECARSULMER, III

Q. Let me turn to the report, 321. Just some basic things. I see that you have listed your hourly rate as \$600 per hour. Is that the current rate?

A. That is accurate.

Q. Am I correct that in 2004 it was \$450, back in the AMF case?

A. That's correct.

Q. When did the rate change?

A. In 2005.

Q. What was the circumstance of that?

A. I was discussing being retained in another case and discussed the going rate and was informed that \$600 was a fair rate.

Q. In Paragraph 3 of the report, in the category of Prior Testimony, you write: "I am also currently retained as an expert in a matter before the United States District Court in the Northern District of Texas."

What is that matter, in general terms?

A. It is a -- it's a similar type of case. The company is called Flowserve, and

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EDWARD NECARSULMER, III

A. I have not.

Q. Have you -- as a technical matter, have you yet been found by any court either qualified or unqualified to render an expert witness opinion on any subject?

MR. GLUCKOW: Objection to the form.

You can answer.

THE WITNESS: No.

BY MR. LEWIS:

Q. Have you ever been retained as an expert on matters of disclosure?

MR. GLUCKOW: Objection to the form.

You can answer.

THE WITNESS: Not specifically.

The assignment is usually phrased as due diligence; however, you tend to get asked whether the due diligence led to the proper disclosure.

BY MR. LEWIS:

Q. Have you ever, other than in this present litigation, included an opinion in one of your reports on the subject of whether

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EDWARD NECARSULMER, III

it is plaintiffs coming after the company and underwriter defendants based on a number of issues which due diligence is one.

Q. And what underwriters have retained you in that case?

A. The --

MR. GLUCKOW: Objection to the form. It assumes facts not in evidence.

MR. LEWIS: I'll withdraw the question.

BY MR. LEWIS:

Q. Who has retained you in that case?

A. The firm of Jenkins & Gilchrist.

Q. And what underwriters are the defendants in that case whose due diligence, among other things, you are considering?

A. CSFB and Banc of America Securities.

Q. Have you yet rendered any opinions in that case?

A. I have not.

Q. Have you testified in that case?

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EDWARD NECARSULMER, III

something should have been disclosed as a result of due diligence?

MR. GLUCKOW: Objection to the form.

I think you've already established the only other report is the Exhibit 324.

But you can answer.

THE WITNESS: No.

BY MR. LEWIS:

Q. I note in your description of your experience that both presently and between March of '98 and May of 2000 you have acted as a consultant to the financial services industry. Is that fair?

MR. GLUCKOW: Just for the record here, you are looking at what now?

MR. LEWIS: I'm looking at Exhibit A to Court Exhibit 321, and this is the part that includes Mr. Necarsulmer's CV or biography.

BY MR. LEWIS:

Q. Am I correct that between March of 1998 and May 2000 you were a consultant to

8 (Pages 26 to 29)

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1 EDWARD NECARSULMER, III  
2 the financial services industry?

3 A. Yes.

4 Q. And also between May of 2002 and  
5 the present you have been a consultant to that  
6 industry --

7 A. That is correct.

8 Q. -- is that fair?

9 In the course of your work as a  
10 consultant, have you been asked by any  
11 underwriters to render them an opinion outside  
12 of court on whether something they did in due  
13 diligence was appropriate or inappropriate?

14 A. No. The scope of my work, just  
15 if it's useful, the scope of my work has  
16 traditionally been -- and I don't do much of it  
17 anymore -- has been an operating practice,  
18 should we -- how do we organize a sales group,  
19 how do we organize a research group, will this  
20 client's -- things like that.

21 Q. So in what -- I'll try to ask  
22 this fairly.

23 In the course of your career in  
24 the financial industry, leaving aside your  
25 expert witness work of the last several years,

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1 EDWARD NECARSULMER, III  
2 case or a Ferris Baker Watts did, they were  
3 comanagers. So the primary responsibility is  
4 based on the -- is in the arms of the  
5 book-running manager.

6 Q. So were there times while you  
7 were working in the industry, say, on the  
8 commitment committee that you had to send your  
9 investment banking team back to do more due  
10 diligence on a subject?

11 A. Absolutely.

12 Q. Have you ever authored any  
13 publications with respect to due diligence  
14 investigations?

15 MR. GLUCKOW: Object to the form.

16 You can answer.

17 THE WITNESS: Not external, not  
18 things for general use. I certainly  
19 was part of, in firms, making sure that  
20 our standard due diligence procedure,  
21 adding and editing to that, but nothing  
22 for external use.

23 BY MR. LEWIS:

24 Q. You helped create standard due  
25 diligence procedures for one or more firms?

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1 EDWARD NECARSULMER, III  
2 have you been called upon to evaluate due  
3 diligence investigations?

4 A. Absolutely.

5 Q. And when did that -- when was  
6 that first the case in your practice?

7 A. Through my whole career, I  
8 mean. Either as practitioner or running a deal,  
9 but most importantly as a commitment committee  
10 chair or member, which I did for a number of  
11 years, the heart of the work was evaluating your  
12 own investment banker's due diligence or if you  
13 were comanager, the due diligence done by  
14 whoever was the book-running manager, so that  
15 was a significant part of certainly the last 20  
16 years of my career in banking.

17 Q. Just by way of terminology, you  
18 used the phrase book-running manager. Can you  
19 explain what you mean by that?

20 A. In virtually all offerings one  
21 manager -- one of the underwriters -- one of the  
22 managing underwriters is designated as the book  
23 runner and he will be the responsible party.  
24 Like Lehman was in this situation versus what a  
25 Banc of America -- Nations Banc I guess in this

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1 EDWARD NECARSULMER, III  
2 A. Yes.

3 Q. Which firms were they?

4 A. For CJ Lawrence, which then  
5 became Morgan Grenfell and then became Deutsche  
6 Bank.

7 And Wasserstein Perella, I  
8 certainly didn't create it, but as head of the  
9 equity area I altered it to meet my own  
10 practices and standards.

11 Q. In the course of your work in  
12 the financial industry, did you ever receive any  
13 legal training?

14 A. None.

15 Q. Did you ever teach due diligence?

16 A. Let me make sure I phrase this  
17 properly.

18 Particularly in my Deutsche  
19 Bank life, we had a significant number of  
20 training classes, whether they were for MBAs  
21 or for people from other parts of the world,  
22 and I would do -- I would usually run the  
23 equity capital markets classes. Due diligence  
24 was certainly a part of that, would be a  
25 subject underneath the general heading of

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1 EDWARD NECARSULMER, III  
2 investment banking or equity capital markets  
3 and that would be my responsibility.

4 Q. As best you can recall it,  
5 sitting here today, what in general did you --  
6 by way of materials did you present to your  
7 instructees about due diligence?

8 MR. GLUCKOW: You are asking him  
9 to recall the sum and substance of the  
10 lectures?

11 BY MR. LEWIS:

12 Q. Not the sum and substance, but  
13 the nature of the materials that were given.  
14 Were they case studies in due diligence, were  
15 they outlines of or checklists, were they  
16 discussions of cases, discussions of industry  
17 standards? What, in general, did you present  
18 when you were teaching due diligence?

19 MR. GLUCKOW: Objection to the  
20 form.

21 You can answer.

22 THE WITNESS: I would usually  
23 include the most recent checklist that  
24 the firm -- the appropriate firm was  
25 using, and I might have some discussion

Page 35

1 EDWARD NECARSULMER, III  
2 of how industry standards might have  
3 changed or might be at the moment, but  
4 I'm really not -- can't be any more  
5 specific than that.

6 BY MR. LEWIS:

7 Q. Do you recall whether the  
8 checklist was annotated with legal authorities?

9 MR. GLUCKOW: Objection to the  
10 form.

11 You can answer.

12 THE WITNESS: No.

13 BY MR. LEWIS:

14 Q. Since I didn't ask the question  
15 very well, I'm not sure whether you don't recall  
16 whether it was, or recall that it wasn't. To  
17 the best of your knowledge, did you provide your  
18 instructees with a checklist that was keyed to  
19 cases --

20 A. No.

21 Q. -- that established  
22 requirements?

23 I ask you to look to Paragraph  
24 B on Page 2 of Exhibit 321. In the middle of  
25 the paragraph you use the phrase: "Although

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1 EDWARD NECARSULMER, III  
2 the registration statement is the issuer's,  
3 the underwriting team," dash, "including its  
4 counsel is also responsible for the  
5 completeness, materiality, and veracity of  
6 this information."

7 Why do you say that the  
8 registration statement is the issuer's?

9 A. It's a fact. They file it, they  
10 are the only ones who could make changes to it,  
11 respond to comments.

12 Q. Okay. Have you ever heard  
13 anyone express the view that as a matter of law  
14 under the 1933 Act that both the underwriters  
15 and the issuer are equally legally responsible  
16 for the content of the document subject to the  
17 due diligence defense?

18 MR. GLUCKOW: Objection to the  
19 form. Calls for a legal conclusion.

20 You can answer.

21 THE WITNESS: I do understand  
22 that. I guess my response would be to  
23 the first -- back to the first part of  
24 what the question is, as a matter of  
25 business practice, the registration

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1 EDWARD NECARSULMER, III  
2 statement, and certainly in the many  
3 deals that I've worked on, is the  
4 issuer's document. Issuer's counsel,  
5 you know, is the first name on the  
6 agents for service. It's just the way  
7 things are done.

8 BY MR. LEWIS:

9 Q. If you would just look for a  
10 second and maybe keep by you the report from the  
11 AMF litigation, Exhibit 324.

12 If you look to the same  
13 Paragraph B in that report, you will see there  
14 is no -- unless I miss it -- statement in that  
15 paragraph to the effect that the registration  
16 statement is the issuer's.

17 MR. GLUCKOW: You mean those  
18 words are not in Exhibit 324?

19 MR. LEWIS: They are not on it.  
20 Not that I see.

21 MR. GLUCKOW: The document speaks  
22 for itself.

23 MR. LEWIS: Correct me if it's  
24 somewhere else.

25 MR. GLUCKOW: Is there a

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EDWARD NECARSULMER, III

question?

BY MR. LEWIS:

Q. Well, was there some reason that you added that reference -- strike that.

Is there some reason that in writing your report in this litigation you felt it useful to include a reference that the registration statement is the issuer's?

A. There's no particular reason. These are conclusions that I drew from reading the material and thought that they were relevant.

Q. Getting back to 321 at Paragraph 6 on Page 3, describing the due diligence process in this case, you write: "The process was enhanced by the book-running firm's commitment process. A complete memo was prepared and presented to a group of senior firm members. This group further reviewed and validated the deal team's due diligence efforts."

MR. GLUCKOW: Excuse me. If you wouldn't mind, I think you lost the witness in terms of where you were

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EDWARD NECARSULMER, III  
reading from. Would you mind going back and redirecting us to where you are.

MR. LEWIS: We are on Page 3, Paragraph 6.

MR. GLUCKOW: And we are on 321; correct?

MR. LEWIS: Right, 321.

BY MR. LEWIS:

Q. "The process was enhanced by the book-running firm's commitment process. A complete memo was prepared and presented to a group of senior firm members. This group further reviewed and validated the deal team's due diligence efforts."

When you wrote that, were you referring to the commitment memo that appears at Exhibit 74?

A. Yes.

MR. GLUCKOW: When you said -- just for the record, I'm assuming your question is referring to the complete memo as opposed to the process referred to in Paragraph 6?

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EDWARD NECARSULMER, III

MR. LEWIS: Right.

BY MR. LEWIS:

Q. Exhibit 74 is the complete memo that you referred to in Paragraph 6?

A. To the best of my recollection.

Q. Did you receive any information from Lehman about the commitment process other than appears in the documents that are listed in your report?

A. No.

Q. Did you read Exhibit 74 from cover to cover in the process of your work on this case?

A. Yes.

Q. Did you find someplace in Exhibit 74 where there is reference to either potential gray marketing or to potential Costco distribution?

A. Not that I recall.

Q. Do you have any reason to believe that either gray marketing or Costco distribution were mentioned orally to the commitment committee, although those terms don't appear in the memo?

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EDWARD NECARSULMER, III

A. I wouldn't know.

Q. From your experience working in the industry, would you expect that the commitment committee would be provided with facts at a commitment committee meeting that did not appear in the memorandum that was being presented to them?

MR. GLUCKOW: Objection. Calls for speculation.

You can answer.

THE WITNESS: I just wasn't there. Certainly, from a practice matter, you might ask questions -- you do ask questions; you frankly grill the team -- the presenters. That's the process.

BY MR. LEWIS:

Q. What is the purpose of a commitment committee memorandum, as you understand it?

A. It's really to generally familiarize people who are not actively involved with the transaction as to what they are going to hear, the subject, and, maybe, hopefully --

11 (Pages 38 to 41)



Page 42

1 EDWARD NECARSULMER, III  
2 it doesn't always work this way -- they'll think  
3 about it before they walk in the door.

4 Q. The "they" being the commitment  
5 committee itself?

6 A. The commitment committee,  
7 correct.

8 Q. Now, getting to Paragraph 7 of  
9 your report, which includes a summary of your  
10 opinions -- this is Paragraph 7, Summary, Page  
11 4, the next page. Let me take this in pieces.

12 The first sentence reads:  
13 "Based on my long industry experience and the  
14 information presented to me, it is my opinion  
15 that the underwriters of this offering  
16 performed due diligence in line with normal  
17 industry standards and practice."

18 Can you explain to me, sir,  
19 what you mean by "in line with normal industry  
20 standards and practice"?

21 A. The years of experience that I  
22 had actually doing this leads me to believe --  
23 leads me to think I understand, you know, what  
24 is required and what is expected for the  
25 process, and when I opine that it's in line with

Page 43

1 EDWARD NECARSULMER, III  
2 that, it means simply that, that I think they  
3 complied with what I think is necessary to have  
4 complete due diligence.

5 Q. Are the industry standards that  
6 you refer to in your opinion something that is  
7 written down in some industry publication or  
8 guideline?

9 A. It's business practice.

10 Q. An actual business practice that  
11 you have observed in your years of working in  
12 the financial industry, correct?

13 A. Yes.

14 Q. That experience was gained at  
15 the firms that are mentioned -- that you've  
16 already mentioned in your testimony and also  
17 Hallgarten, H-A-L-L-G-A-R-T-E-N, and Company?

18 A. Yes.

19 Q. Hallgarten and Company was at  
20 one point Moseley and Hallgarten?

21 A. Actually, the opposite.  
22 Hallgarten and Company was a firm of which there  
23 were a great number. It was actually founded in  
24 1850 and had a significant business but then  
25 became part of Moseley and Hallgarten, and there

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1 EDWARD NECARSULMER, III  
2 was a period in the '70s when there was a huge  
3 conglomeration of firms.

4 Actually, I did a fair amount  
5 of due diligence where I was the guy who  
6 actually went and visited the factory at that  
7 point in my career.

8 Q. Opened the boxes?

9 A. Correct.

10 Q. Now, the next sentence of your  
11 opinion, immediately following the one I read  
12 previously, reads: "Their actions were  
13 consistent with a standard of reasonableness as  
14 I understand it, and were more than sufficient  
15 to satisfy me as to their adequacy and  
16 completeness."

17 Again, words are the heart of all  
18 depositions, I guess. What do you mean by "a  
19 standard of reasonableness as I understand it"?

20 A. As we've already established, I  
21 have no legal training, but it's certainly my  
22 business understanding or concept that the  
23 underwriters are supposed to conduct reasonable  
24 due diligence, and, again, in compliance with  
25 what I've done in my own career, I've felt and

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1 EDWARD NECARSULMER, III  
2 feel that this meets those standards -- that  
3 their efforts meet those standards. Let me  
4 phrase that better.

5 Q. The standard that you refer to  
6 then in that sentence is a standard based on  
7 your empirical observation and personal work in  
8 the financial industry rather than anything that  
9 is written down in text anywhere?

10 MR. GLUCKOW: Objection to the  
11 form.

12 You can answer.

13 THE WITNESS: Yes.

14 BY MR. LEWIS:

15 Q. Have you been a member of any  
16 industry committees or associations at which  
17 representatives of underwriting firms sit down  
18 to discuss principles of due diligence?

19 A. I've participated in numerous  
20 industry panels and study groups and the like,  
21 commented on rules, changing the department of  
22 corporate financing's rules, et cetera. Due  
23 diligence is certainly part of it, but I  
24 couldn't cite you a time when I attended a  
25 special seminar on due diligence, but I was an

12 (Pages 42 to 45)

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1 EDWARD NECARSULMER, III  
2 active participant in Securities Industry  
3 Association, Investment Bankers Association,  
4 NASD, Group of Corporate Finance, I did a lot of  
5 that kind of thing, yes.

6 Q. You believe you've at least  
7 heard people talk at such meetings, in such  
8 context about due diligence?

9 A. I do.

10 Q. Have you read any publications  
11 about due diligence?

12 MR. GLUCKOW: Ever?

13 MR. LEWIS: Ever.

14 THE WITNESS: Yes, but I can't  
15 really recall -- I can't cite any, but  
16 I know that I've done so.

17 BY MR. LEWIS:

18 Q. Do you recall anything you've  
19 seen in writing about due diligence in the last  
20 five years?

21 MR. GLUCKOW: Object to the form.

22 You can answer.

23 THE WITNESS: No.

24 BY MR. LEWIS:

25 Q. In the first sentence of this

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1 EDWARD NECARSULMER, III  
2 parts of this, were present at  
3 meetings, so I would not use the word  
4 -- I think the word you used was  
5 advocated or --

6 BY MR. LEWIS:

7 Q. Delegated.

8 A. Delegated, I think to the extent  
9 that it's industry standard to clearly delegate  
10 the lead to the book-running manager, but I  
11 think they performed in line with what I would  
12 have expected.

13 Q. What were you referring to with  
14 respect to the other underwriters keeping their  
15 own files?

16 A. I have production from Nations  
17 Banc; I've seen some of their work; I've seen  
18 the fact that they participated in meetings.

19 Q. As part of the overall  
20 Underwriter Defendants Document Production Pages  
21 1 to 11636?

22 A. That's correct.

23 Q. Can you recall anything that  
24 Nations Banc did with respect to an evaluation  
25 of possible gray marketing or Costco

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1 EDWARD NECARSULMER, III  
2 summary you refer to the underwriters of this  
3 offering having performed due diligence in line  
4 with normal industry standards and practice.

5 Are you referring there to  
6 Lehman Brothers rather than to Ferris Baker  
7 Watts or Nations Banc?

8 A. I'm referring to all three  
9 managers.

10 Q. Do you believe that the  
11 underwriters other than Lehman Brothers  
12 satisfied their due diligence by delegating that  
13 function to Lehman which, in your view,  
14 satisfactorily performed it?

15 MR. GLUCKOW: Objection to form.

16 Assumes facts not in evidence.

17 Mischaracterizes the testimony.

18 You can answer.

19 THE WITNESS: I don't believe  
20 they -- look, the practical reality is  
21 that the managing underwriter is  
22 responsible for the process, but I  
23 think there's ample reference to the  
24 fact that the other firms kept their  
25 own files, participated in various

Page 49

1 EDWARD NECARSULMER, III  
2 distribution of Adams clubs?

3 A. No.

4 Q. Can you recall anything that  
5 Ferris Baker Watts did with respect to gray  
6 marketing or possible Costco distribution of  
7 Adams clubs?

8 A. No.

9 Q. Just to be clear in terms of  
10 your reading, have you ever read case law  
11 regarding the legal standards for due diligence?

12 MR. GLUCKOW: Object to the form.

13 You can answer.

14 THE WITNESS: Not that I recall.

15 BY MR. LEWIS:

16 Q. Have you heard of any cases,  
17 legal cases, in the field of due diligence that  
18 you consider to be important cases?

19 A. No.

20 Q. Have you ever heard of a  
21 decision in a case called Escott, E-S-C-O-T-T,  
22 versus Bar Chris, B-A-R capital C-H-R-I-S?

23 A. I've heard of the case, but it  
24 was in an earlier time.

25 Q. Have you heard of a decision in

13 (Pages 46 to 49)



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1 EDWARD NECARSULMER, III  
 2 Feit, F-E-I-T, versus Leasco, L-E-A-S-C-O, by  
 3 Judge Weinstein?  
 4 A. No.  
 5 Q. Have you heard that a decision  
 6 was rendered in the Worldcom litigation by Judge  
 7 Denise Cote, C-O-T-E, on the subject of due  
 8 diligence?  
 9 A. Yes.  
 10 Q. Have you read that decision?  
 11 A. I have not.  
 12 Q. Have you been told anything  
 13 about the contents of the decision?  
 14 A. Only what I've read.  
 15 Q. And what have you read?  
 16 A. Just in terms of general press  
 17 coverage of the matter.  
 18 Q. Do you know any principles that  
 19 she referred to in her opinion?  
 20 A. No.  
 21 Q. Would you agree with the general  
 22 proposition -- and, please, if you don't agree,  
 23 tell me -- that over the years the underwriter  
 24 has been regarded as a type of gatekeeper to the  
 25 capital marketplace?

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1 EDWARD NECARSULMER, III  
 2 MR. GLUCKOW: Object to the form.  
 3 You can answer.  
 4 THE WITNESS: Yes.  
 5 BY MR. LEWIS:  
 6 Q. You do agree with that?  
 7 A. I do.  
 8 Q. And would you agree that an  
 9 underwriter's reputation has helped small  
 10 companies gain access to capital markets?  
 11 MR. GLUCKOW: Object to the form.  
 12 You can answer.  
 13 THE WITNESS: Yes.  
 14 BY MR. LEWIS:  
 15 Q. Do you believe that it is true  
 16 that underwriters have been considered  
 17 responsible for assuring the accuracy of an  
 18 issuer's offering materials?  
 19 A. I don't believe that to be true.  
 20 Q. And can you tell me why?  
 21 A. I think among -- let me make  
 22 sure I phrase this properly. I think among  
 23 sophisticated investors, it's well-known that  
 24 the company is, in fact, you know, the better  
 25 source about its business and that underwriters

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1 EDWARD NECARSULMER, III  
 2 will certainly do -- are certainly important in  
 3 the process; but I don't believe that it's -- it  
 4 completely -- that it's generally recognized  
 5 that that is part of the underwriters'  
 6 responsibility.  
 7 Q. Do you believe that in initial  
 8 public offerings underwriters are heavily relied  
 9 upon by the investing public?  
 10 A. I do believe that.  
 11 Q. Do you believe that's true  
 12 especially where the companies doing the IPOs  
 13 are experiencing rapid growth and change just  
 14 before the IPO?  
 15 MR. GLUCKOW: Object to the form.  
 16 You can answer.  
 17 THE WITNESS: I don't think  
 18 there's any difference from your last  
 19 question. I think your last question  
 20 is true, I wouldn't modify it.  
 21 BY MR. LEWIS:  
 22 Q. Okay.  
 23 A. The first question is true,  
 24 excuse me.  
 25 Q. Do you agree that the

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1 EDWARD NECARSULMER, III  
 2 reasonableness of a due diligence investigation  
 3 varies with the factual circumstances of each  
 4 offering?  
 5 A. I do.  
 6 Q. To what extent do you believe  
 7 expense is a determinant in how thorough due  
 8 diligence should be?  
 9 MR. GLUCKOW: Object to the form.  
 10 You can answer.  
 11 THE WITNESS: Virtually not at  
 12 all.  
 13 BY MR. LEWIS:  
 14 Q. And why is that?  
 15 A. I think people's reputation and  
 16 their relationship with their clients -- I'm  
 17 talking about from an underwriter's point of  
 18 view now -- is priceless and cost, just for  
 19 better or worse, was never an issue.  
 20 Q. Now, do you believe that in the  
 21 securities industry the standards for due  
 22 diligence are more rigorous in an IPO than in a  
 23 follow-on offer?  
 24 MR. GLUCKOW: Object to the form.  
 25 You can answer.

14 (Pages 50 to 53)

Page 54

EDWARD NECARSULMER, III  
 THE WITNESS: I have a difficult  
 -- I think your concept is correct, but  
 I'm not sure rigorous -- I guess what  
 I'm trying to say is since there is  
 less information in the public domain,  
 more work is traditionally done, but I  
 think the standards are pretty much the  
 same.

BY MR. LEWIS:

Q. So the standards are the same  
 but the work is more rigorous in the IPO than in  
 the follow-on offerings?

MR. GLUCKOW: Object to the  
 form. Mischaracterizes the testimony.

You can answer.

THE WITNESS: What I'm trying to  
 say -- maybe I didn't say it properly  
 -- is that if you are working on the  
 second, third, or fourth offering for a  
 company, A, you are knowledgeable,  
 assuming you have the same team in  
 place or parts of the same team in  
 place; and, B, the body of information  
 has been organized and is more easily

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EDWARD NECARSULMER, III  
 -- easy to digest and to process. An  
 IPO you tend -- sometimes have to  
 really break new ground to get  
 information.

BY MR. LEWIS:

Q. Would you agree that the  
 securities industry as a whole expects more due  
 diligence work in an IPO than in a follow-on  
 offering?

MR. GLUCKOW: Object to the  
 form. Vague and ambiguous.

You can answer.

THE WITNESS: I wouldn't agree to  
 that.

BY MR. LEWIS:

Q. I think -- strike that.  
 Is it true in an IPO that  
 because securities have not been previously  
 publicly traded, information about an issuer  
 is often not readily available to the public  
 as a whole?

MR. GLUCKOW: Object to the form.

You can answer.

THE WITNESS: It's too hard to

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EDWARD NECARSULMER, III  
 generalize. I mean, Google, there were  
 no secrets, yet I'm sure on some small  
 companies there are secrets, or that  
 may be the wrong way to phrase it, but  
 information that is not as available.

BY MR. LEWIS:

Q. Would you disagree then that the  
 standards for due diligence are higher than  
 usual where a company going through an IPO is  
 experiencing rapid growth and change?

MR. GLUCKOW: Objection to the  
 form.

You can answer.

It's vague and ambiguous.

THE WITNESS: I don't think I can  
 answer. I'm not unwilling to, I just  
 don't think I can answer that. I don't  
 think the standards -- you are faced  
 with the same issue when you agree to  
 commit your capital and your reputation  
 to underwrite securities and there may  
 be a number of, you know, intensity, or  
 whatever the proper phrase would be,  
 someplace within the same scale and I

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EDWARD NECARSULMER, III  
 don't think it's just because it's an  
 initial public offering or just because  
 it's a company that's a rapidly growing  
 company.

BY MR. LEWIS:

Q. So in the past when you -- I  
 take it you have performed -- you have  
 participated in some way or other in due  
 diligence investigations both of companies going  
 through IPOs and companies going through  
 follow-on offerings. Is that correct?

A. That is correct.

Q. And in those situations you did  
 not expect the due diligence team to adjust its  
 level of due diligence to take into account the  
 newness of the one company versus the previous  
 offering of the other?

MR. GLUCKOW: Object to the  
 form. Mischaracterizes the testimony.

You can answer.

THE WITNESS: I don't think  
 that's what I said, or if I did say  
 that, that's not what I meant. What I  
 meant was there are a whole set of

15 (Pages 54 to 57)

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1 EDWARD NECARSULMER, III  
2 variables. Some of the ones you've  
3 mentioned are variables -- are valid  
4 ones, but there are -- just the  
5 existence of the fact that it was a  
6 fast growing company or it was a new  
7 company would not be enough for me to  
8 direct the team to do something  
9 different.

10 BY MR. LEWIS:

11 Q. What variables, if any, would  
12 cause you to direct the team to do something  
13 different in due diligence?

14 MR. GLUCKOW: I'm going to object  
15 to the form and object on the ground  
16 that it's vague and ambiguous and quite  
17 overbroad.

18 But you can answer.

19 THE WITNESS: I mean it's a  
20 situation-by-situation issue. I think  
21 that -- and I can only, you know,  
22 really respond to it anecdotally if I  
23 can think of some appropriate  
24 anecdotes. But I guess my point is,  
25 without belaboring this, is you look at

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1 EDWARD NECARSULMER, III  
2 each situation and hopefully -- you  
3 know, if you are managing the process,  
4 you look at each situation and  
5 hopefully you figure out, you know,  
6 what you need to do to satisfy your  
7 commitment committee, yourself, and the  
8 marketplace. And there are really no  
9 other rules specific -- you know,  
10 templates I can honestly look at you  
11 and offer beyond that.

12 BY MR. LEWIS:

13 Q. Have you ever had the experience  
14 of adjusting the due diligence that you were  
15 conducting on a company because the company had  
16 management that had not had long experience in  
17 running a public company?

18 A. Yes.

19 Q. And why did you do that?

20 A. Well, because simply as a matter  
21 of mechanics. In many cases if a company had  
22 done other offerings or was -- let's say had  
23 done other offerings or had significant -- had  
24 done private equity financings or other  
25 transactions, typically they might be more

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1 EDWARD NECARSULMER, III  
2 organized in terms of your ability to get  
3 documents and things that were on point that  
4 would go right to your organizational outline,  
5 where if they hadn't, you might have to really  
6 help them set up the process.

7 Q. Would you agree that in an  
8 initial public offering there is a strong  
9 affirmative duty of disclosure?

10 MR. GLUCKOW: Object to the  
11 form. Vague and ambiguous. Calls for  
12 a legal conclusion.

13 You can answer.

14 THE WITNESS: Yes.

15 BY MR. LEWIS:

16 Q. Would you agree that in  
17 conducting due diligence it is necessary for the  
18 due diligence team to continue its investigation  
19 of the issuer up to and including the effective  
20 date of the registration statement?

21 A. Yes.

22 Q. And a due diligence  
23 investigation would be inadequate if the  
24 underwriter did not do that?

25 MR. GLUCKOW: Object to the

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1 EDWARD NECARSULMER, III  
2 form. It calls for a legal conclusion.

3 You can answer.

4 THE WITNESS: I mean, the easy  
5 answer is yes, but -- well, okay, let  
6 me just leave it at yes.

7 BY MR. LEWIS:

8 Q. Is it your understanding as a  
9 non-lawyer that one of the duties of  
10 underwriters is to deal fairly with the  
11 investing public?

12 MR. GLUCKOW: Object to the form.

13 You can answer.

14 THE WITNESS: Absolutely.

15 BY MR. LEWIS:

16 Q. Isn't that sometimes referred to  
17 as the shingle theory?

18 A. I'm not familiar with that.

19 Q. I take it from your initial  
20 report that one of your beliefs is that an  
21 underwriter has an obligation to conduct a  
22 reasonable investigation in an IPO?

23 A. Yes.

24 Q. And there is a long tradition  
25 since the securities laws were enacted in the

16 (Pages 58 to 61)

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1 EDWARD NECARSULMER, III  
2 '30s of underwriters conducting due diligence  
3 investigations?

4 MR. GLUCKOW: Object to the  
5 form. Vague and ambiguous.

6 You can answer.

7 THE WITNESS: Yes.

8 BY MR. LEWIS:

9 Q. To your knowledge, how far back  
10 in time have due diligence investigations been  
11 conducted by underwriters?

12 A. I think they were formalized by  
13 the 33 Act, but I don't go back quite that far,  
14 but it's certainly my understanding that  
15 particularly, you know, throughout history, you  
16 know, you committed your own capital to a  
17 greater extent I think than -- now things come  
18 full cycle, but in the beginning I think people  
19 did due diligence as, you know -- it's my  
20 understanding that a lot of due diligence --  
21 what due diligence was done was, in fact, you  
22 know, a matter of, you know, of self-protection  
23 as opposed to any responsibility -- as opposed  
24 to exclusively a responsibility to, you know,  
25 investors.

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1 EDWARD NECARSULMER, III  
2 Q. Did your work in the securities  
3 industry begin in 1967 with Hallgarten?

4 A. Correct.

5 Q. In the time that you've been in  
6 the industry, have you become aware of any  
7 changes in practical standards for due diligence  
8 investigations?

9 MR. GLUCKOW: Objection. Vague  
10 and ambiguous. Overbroad.

11 You can answer.

12 BY MR. LEWIS:

13 Q. Let me reframe the question.  
14 Have you become aware of  
15 changes in practice with respect to due  
16 diligence investigations over the time since  
17 1967 that you've been employed in the  
18 industry?

19 MR. GLUCKOW: The same objection.

20 You can answer.

21 THE WITNESS: None to the basic  
22 tenets of how the business or the  
23 process is done. I think one of the  
24 main changes that I've seen is that to  
25 the extent that the managing

Page 64

1 EDWARD NECARSULMER, III  
2 underwriter has taken an even larger  
3 responsibility or has been delegated --  
4 I don't like the word delegated, but  
5 has been delegated a responsibility by  
6 the other comanagers to a greater  
7 extent.

8 And the other -- if I can just  
9 illuminate. The process has gotten  
10 better to the extent that investment  
11 banks began to specialize in either  
12 certain industries or had groups that  
13 did certain industries; whereas, in my  
14 life, everybody was a generalist and so  
15 that if you were doing a  
16 telecommunications deal, it would be  
17 done by the telecommunications group in  
18 Lehman Brothers or Goldman Sachs or  
19 something, who really became quite  
20 expert.

21 I know we had a significant  
22 technology practice and management  
23 would often tell me that some of the  
24 people in that group are as  
25 knowledgeable -- not as they were, of

Page 65

1 EDWARD NECARSULMER, III  
2 course, but as their competitors were  
3 about the business.

4 MR. GLUCKOW: I think we've been  
5 going a little bit over an hour. If  
6 there's a point in your outline where  
7 we could take a short break.

8 MR. LEWIS: We can take it right  
9 now.

10 MR. GLUCKOW: That would be  
11 great.

12 (A recess was had from 1:18 p.m.  
13 to 1:26 p.m.; and then the proceedings  
14 continued as follows:)

15 BY MR. LEWIS:

16 Q. Mr. Necarsulmer, outside of this  
17 litigation, before you did your work in this  
18 case, did you ever hear it said that  
19 underwriters were required to act as a prudent  
20 man would in the management of his own property?

21 MR. GLUCKOW: Those words?

22 MR. LEWIS: Yes.

23 THE WITNESS: I've certainly  
24 heard of the prudent man rule, but I  
25 thought it referred to trust companies

17 (Pages 62 to 65)



Page 66

1 EDWARD NECARSULMER, III  
 2 and mutual funds.  
 3 BY MR. LEWIS:  
 4 Q. Okay. Have you heard anything  
 5 else said about whether underwriters had to act  
 6 as a prudent man in the management of his own  
 7 property?  
 8 A. I've never heard that.  
 9 Q. Do you believe that underwriters  
 10 are entitled to rely solely on the  
 11 representations of a company's officers or  
 12 counsel?  
 13 MR. GLUCKOW: Object to the form.  
 14 You can answer.  
 15 THE WITNESS: No.  
 16 BY MR. LEWIS:  
 17 Q. And why do you not believe that  
 18 they can do so?  
 19 A. In my experience, when possible,  
 20 and when relevant, it always -- it wasn't always  
 21 the case. If there are independent checks, you  
 22 can do formal or informal, it's a useful part of  
 23 the process.  
 24 Q. Do you believe that verification  
 25 of information is a critical step in the due

Page 67

1 EDWARD NECARSULMER, III  
 2 diligence process?  
 3 A. Yes.  
 4 Q. And do you believe that that is  
 5 necessary because even honest clients can make  
 6 mistakes?  
 7 MR. GLUCKOW: Objection to the  
 8 form.  
 9 You can answer.  
 10 BY MR. LEWIS:  
 11 Q. Do you believe that one reason  
 12 that verification is necessary is because even  
 13 honest clients can make mistakes?  
 14 MR. GLUCKOW: Same objection.  
 15 You can answer.  
 16 THE WITNESS: Yes. I don't  
 17 enthusiastically agree, but I will  
 18 concede that.  
 19 BY MR. LEWIS:  
 20 Q. Okay. Do you agree that another  
 21 reason that it may be necessary is because  
 22 honest clients can be overenthusiastic or  
 23 overoptimistic?  
 24 A. Yes.  
 25 MR. GLUCKOW: The "it" being

Page 68

1 EDWARD NECARSULMER, III  
 2 verification?  
 3 MR. LEWIS: Yes.  
 4 BY MR. LEWIS:  
 5 Q. And is it your belief that on  
 6 rare occasions statements may be made by company  
 7 officers to induce an underwriter to underwrite  
 8 an offering where those statements are  
 9 deliberately false?  
 10 MR. GLUCKOW: Objection to the  
 11 form. Vague and ambiguous.  
 12 You can answer.  
 13 THE WITNESS: It certainly has  
 14 happened.  
 15 BY MR. LEWIS:  
 16 Q. Can you think of any situations  
 17 where it has happened?  
 18 MR. GLUCKOW: In his own  
 19 experience?  
 20 BY MR. LEWIS:  
 21 Q. Either in your own experience or  
 22 those you have heard of?  
 23 A. I can't give you a specific  
 24 example.  
 25 Q. Do you agree with the

Page 69

1 EDWARD NECARSULMER, III  
 2 proposition that underwriters must be alert to  
 3 exaggerations by an issuer?  
 4 MR. GLUCKOW: Object to the form  
 5 and object to the ground that like  
 6 these other questions, that it's vague  
 7 and ambiguous and overbroad.  
 8 But you can answer.  
 9 THE WITNESS: Yes.  
 10 BY MR. LEWIS:  
 11 Q. Now, do you believe that there  
 12 are any industry standards relating to  
 13 verification of information supplied by an  
 14 issuer?  
 15 A. No.  
 16 MR. GLUCKOW: I offer a belated  
 17 objection to the form.  
 18 BY MR. LEWIS:  
 19 Q. Have there been instances in  
 20 your career where to verify information you or  
 21 people working for you interviewed lower level  
 22 employees of a corporation?  
 23 A. I can't answer that yes or no.  
 24 I've seen it done, not in a verification sense,  
 25 but if I may, for example, in a business where

18 (Pages 66 to 69)

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1 EDWARD NECARSULMER, III  
2 one particular product line, geographic line,  
3 factory is critical or critical to driving  
4 growth of sales and revenues, I've seen it done  
5 where you've asked to be exposed to the actual  
6 hands-on people in that area, but it's not  
7 customary, except for, again, you might meet a  
8 plant manager if you go look at a facility, that  
9 kind of thing, but he would more be a tour guide  
10 and you would generally speak to the designated  
11 heads of marketing, finance, manufacturing,  
12 whatever the traditional department heads of the  
13 company are. That's certainly my experience.

14 Q. In the instances you gave of  
15 dealing with lower level employees, would it be  
16 fair to say you were giving examples of  
17 situations where the contacts were made for  
18 evaluation of those people or examination of  
19 facilities?

20 MR. GLUCKOW: Objection to the  
21 form.

22 You can answer.

23 THE WITNESS: The latter, not the  
24 former.

25 BY MR. LEWIS:

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1 EDWARD NECARSULMER, III  
2 manufacturing process or something? Typically  
3 not. So oil and gas is the usual example  
4 where you get your independent petroleum  
5 engineer to verify reserves, or something like  
6 that.

7 Q. Do you believe that there are  
8 instances in which verification may require  
9 reviewing internal documents of a company that  
10 the company has not voluntarily supplied?

11 MR. GLUCKOW: Object to the form.

12 You can answer.

13 THE WITNESS: I'm not really  
14 comfortable with the hypothetical. I'm  
15 sure there are situations, I just have  
16 never run into one.

17 BY MR. LEWIS:

18 Q. Do you believe that it's true  
19 that during the due diligence process the  
20 positions of the underwriters and the company's  
21 officers should become somewhat adverse?

22 MR. GLUCKOW: Object to the form.

23 You can answer.

24 THE WITNESS: In an ideal world  
25 there ought to be a nice balance

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1 EDWARD NECARSULMER, III  
2 Q. Okay. But not as a verification  
3 on information that had been supplied by  
4 management?

5 A. Correct.

6 Q. Have there been instances in  
7 your career when either in participating in or  
8 conducting a due diligence investigation you  
9 asked a company to give you access to files that  
10 they had not provided to you?

11 A. I don't recall ever having done  
12 that.

13 Q. Do you believe that use of  
14 industry experts in due diligence is a desirable  
15 thing in general terms?

16 A. Yes, with a qualification. I  
17 think it's important to -- I think it's  
18 important when there's something you don't  
19 understand -- or, again, I'm a practical  
20 character, so I can remember working on an  
21 insurance company deal where there's no way we  
22 would be able to understand actuarial  
23 assumptions, so we would hire our own actuary.

24 But would I encourage the use  
25 of an outside expert to look at somebody's

Page 73

1 EDWARD NECARSULMER, III  
2 between friendly or, you know,  
3 cooperation, but you still need to have  
4 the ability to get the answers, and if  
5 that causes adversity, so be it.

6 BY MR. LEWIS:

7 Q. But would you agree that the due  
8 diligence process often fosters a collaborative  
9 atmosphere between the issuer and the  
10 underwriters?

11 A. It certainly always starts out  
12 that way. Or I should rephrase, usually starts  
13 out that way.

14 Q. In fact, in your report in the  
15 AMF case --

16 A. Mm-hmm.

17 Q. -- Exhibit 324, Page 2,  
18 Paragraph B --

19 MR. GLUCKOW: Hold on; just let  
20 us get there.

21 Okay.

22 BY MR. LEWIS:

23 Q. -- the last sentence, you  
24 wrote: "While the process often fosters a  
25 collaborative atmosphere between issuer and



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1 EDWARD NECARSULMER, III  
2 underwriters, it is essential for due diligence  
3 efforts to be thorough and their conclusions  
4 factually supportable."

5 Do you believe that as a  
6 general proposition?

7 A. I think that's just what I just  
8 said, but, yes.

9 Q. Is there a reason that in  
10 writing your report in this case you took out  
11 the reference to the fostering of a  
12 collaborative atmosphere?

13 A. No. I said to you before that I  
14 used this as a template, but it was more in the  
15 process of ordering things and what I wanted to  
16 cover, but I frankly rethought what I would want  
17 to include in my opinion.

18 MR. GLUCKOW: By the way, for the  
19 record, you are comparing B of 324 with  
20 B of 321?

21 MR. LEWIS: Yes.

22 MR. GLUCKOW: And comparing  
23 collaborative versus cooperation?

24 MR. LEWIS: Right.

25 MR. GLUCKOW: Okay.

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1 EDWARD NECARSULMER, III  
2 BY MR. LEWIS:

3 Q. In your report in 321 you have  
4 written: "While the process requires  
5 cooperation between issuer and underwriters, it  
6 is essential for due diligence efforts to be  
7 thorough and their conclusions factually  
8 supportable."

9 I don't have a question, but if  
10 you want to respond, you are free.

11 MR. GLUCKOW: Wait for a  
12 question.

13 BY MR. LEWIS:

14 Q. Do you believe that in the due  
15 diligence process the underwriters are  
16 frequently required to play devil's advocate?

17 A. Yes.

18 Q. When, in your opinion, does that  
19 become necessary?

20 A. It's hard to be specific. I  
21 mean, it could be from the first meeting to the  
22 bringdown call right before you price. I mean,  
23 it's just part of the ongoing process.

24 Q. Do you agree in principle that  
25 the underwriters must employ a high degree of

Page 76

1 EDWARD NECARSULMER, III  
2 care in their investigations?

3 A. I certainly do.

4 Q. Do you agree that the  
5 underwriters must independently verify the  
6 company's representations?

7 MR. GLUCKOW: Objection to the  
8 form. Asked and answered.

9 You can answer.

10 THE WITNESS: I don't think all  
11 of the representations. I think -- you  
12 know, the basic description of their  
13 business and their business plan and  
14 these kinds of things are -- if you are  
15 going to do business with these people,  
16 you traditionally accept those at face  
17 value.

18 BY MR. LEWIS:

19 Q. Do you believe that in each case  
20 in which an underwriter conducts due diligence  
21 it must conduct a meaningful investigation of  
22 the company?

23 MR. GLUCKOW: Objection to the  
24 form.

25 You can answer.

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1 EDWARD NECARSULMER, III  
2 BY MR. LEWIS:

3 Q. In your report in 321 you have  
4 written: "While the process requires  
5 cooperation between issuer and underwriters, it  
6 is essential for due diligence efforts to be  
7 thorough and their conclusions factually  
8 supportable."

9 I don't have a question, but if  
10 you want to respond, you are free.

11 MR. GLUCKOW: Wait for a  
12 question.

13 BY MR. LEWIS:

14 Q. Do you believe that in the due  
15 diligence process the underwriters are  
16 frequently required to play devil's advocate?

17 A. Yes.

18 Q. When, in your opinion, does that  
19 become necessary?

20 A. It's hard to be specific. I  
21 mean, it could be from the first meeting to the  
22 bringdown call right before you price. I mean,  
23 it's just part of the ongoing process.

24 Q. Do you agree in principle that  
25 the underwriters must employ a high degree of

1 EDWARD NECARSULMER, III  
2 THE WITNESS: I agree with that.

3 BY MR. LEWIS:

4 Q. Would you agree that in the due  
5 diligence context the term investigation can be  
6 defined as conducting a searching inquiry?

7 A. I don't really have a response  
8 to that. I think that's a matter of semantics.  
9 I think you -- whatever procedure and process  
10 you use and you feel is adequate and reasonable,  
11 you do.

12 Q. Is there a definition that you  
13 have in your own mind for what an investigation,  
14 a due diligence investigation, means?

15 A. Yes, but it can vary from  
16 company to company and project to project.

17 Q. Would you agree that to  
18 investigate means to inquire into a subject  
19 matter with attention to detail?

20 A. That's a fair definition.

21 Q. That's a...?

22 A. Fair definition.

23 Q. Fair definition?

24 MR. GLUCKOW: Delayed objection  
25 to the form.

20 (Pages 74 to 77)

Page 78

1 EDWARD NECARSULMER, III  
2 You can answer. And you have.  
3 BY MR. LEWIS:

4 Q. Is it your view that if an  
5 underwriter receives negative information from a  
6 company of some sort, it's required -- it  
7 becomes necessary to follow up on that  
8 information?

9 MR. GLUCKOW: Objection to the  
10 form. Vague and ambiguous.

11 You can answer.

12 THE WITNESS: I think it's  
13 necessary to follow up on all  
14 information - negative, positive, or  
15 sideways.

16 BY MR. LEWIS:

17 Q. And noninformation, also?

18 MR. GLUCKOW: Objection to the  
19 form.

20 You can answer.

21 THE WITNESS: If something is  
22 self-evident or that's just a fact, no,  
23 you don't need to follow up on it,  
24 but...

25 BY MR. LEWIS:

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1 EDWARD NECARSULMER, III  
2 not -- it's not the final answer.

3 BY MR. LEWIS:

4 Q. Have you been involved in due  
5 diligence investigations where a great amount of  
6 time and money was spent in the investigation  
7 and the investigation was not to your  
8 satisfaction?

9 A. Yes.

10 Q. And can you give any anecdotal  
11 examples of that?

12 A. Well, all I can tell you is I  
13 have been in situations where, either as a  
14 commitment committee or as just a man heading up  
15 a department, I didn't feel we had adequate  
16 information to -- either in one specific area or  
17 in general or that we had gone far enough to  
18 sign off on underwriting the or presenting it to  
19 whoever needed to sign off on it, so the answer  
20 is yes.

21 Q. What did you do in that instance  
22 or instances?

23 A. You go back and you do more  
24 work.

25 Q. Did you ever hold up an offering

Page 79

1 EDWARD NECARSULMER, III  
2 Q. Do you use the term red flags in  
3 your work?

4 A. Yes.

5 Q. How do you use that term?

6 A. To define issues that either  
7 require further attention or are not -- or  
8 perhaps inconsistent with what we -- our, you  
9 know, prior impression would be.

10 Q. Is it your opinion that it is  
11 necessary for an underwriter to follow up on any  
12 red flag that suggests that a registration  
13 statement may not be complete and accurate?

14 A. I mean, the general answer to  
15 the question is yes, but it's very hard just to  
16 -- let me leave it there. Yes.

17 Q. Would you agree that merely  
18 spending a lot of time on an investigation,  
19 meeting a lot of times with management, and  
20 reviewing a lot of documents is not necessarily  
21 sufficient in a due diligence investigation?

22 MR. GLUCKOW: Vague and  
23 ambiguous.

24 You can answer.

25 THE WITNESS: It doesn't -- it's

Page 81

1 EDWARD NECARSULMER, III  
2 to do more work?

3 A. Yes.

4 Q. How recently was that, in  
5 general?

6 A. I would say that would have been  
7 pre-1998.

8 Q. Do you have an opinion on  
9 whether that portion of the due diligence  
10 investigation which the underwriters in this  
11 case did with respect to possible gray marketing  
12 or Costco distribution of Adams products  
13 satisfied industry standards?

14 MR. GLUCKOW: Objection to the  
15 form. Vague and ambiguous. The report  
16 speaks for itself.

17 You can answer.

18 THE WITNESS: I believe it does.  
19 BY MR. LEWIS:

20 Q. So you do in fact believe that  
21 the underwriters in this case did investigate  
22 possible gray marketing or Costco distribution  
23 of Adams products?

24 A. I believe that underwriters were  
25 aware of the situation, made a judgment about

21 (Pages 78 to 81)

Page 82

1 EDWARD NECARSULMER, III  
2 how impactful it was upon the company, and acted  
3 accordingly.

4 Q. And the opinion you have on that  
5 subject is based, as is your overall opinion, on  
6 industry standards rather than legal standards?

7 MR. GLUCKOW: Objection to the  
8 form.

9 You can answer.

10 THE WITNESS: Yes.

11 BY MR. LEWIS:

12 Q. You are not relying on any cases  
13 with respect to that?

14 A. Right.

15 Q. It's your observation of  
16 industry norms?

17 A. Correct.

18 Q. Do you know of any investigation  
19 that the underwriters conducted of gray  
20 marketing or Costco issues other than what is  
21 reflected in the writings that you have listed  
22 in the attachment to your report?

23 MR. GLUCKOW: Object to the form.

24 You are referring to Exhibit A to  
25 321?

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1 EDWARD NECARSULMER, III  
2 MR. LEWIS: 321.

3 MR. GLUCKOW: Exhibit B?

4 MR. LEWIS: Exhibit B.

5 THE WITNESS: Those were the  
6 materials that I reviewed, solely and  
7 completely.

8 BY MR. LEWIS:

9 Q. Do you believe that the best  
10 record of what actions the underwriters take in  
11 a due diligence investigation is what they  
12 preserve in writing?

13 MR. GLUCKOW: Objection to the  
14 form. Vague and ambiguous.

15 You can answer.

16 THE WITNESS: I don't know how to  
17 answer the question.

18 The written record is certainly,  
19 you know, significant in the part that  
20 lasts, but when you sit in a commitment  
21 committee or when you sit with your  
22 boss and you say, you know, these are  
23 important issues, that could be equally  
24 important, but certainly the only thing  
25 I can refer to is what I've seen.

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1 EDWARD NECARSULMER, III  
2 BY MR. LEWIS:

3 Q. Based on your experience in the  
4 industry, is it customary to record in writing  
5 any significant activities you undertake as part  
6 of a due diligence investigation?

7 MR. GLUCKOW: Objection to the  
8 form. Vague and ambiguous.

9 You can answer.

10 THE WITNESS: Customary but not  
11 exclusive.

12 BY MR. LEWIS:

13 Q. Can you explain what you mean by  
14 that?

15 A. What I mean by that is that you  
16 obviously want to write down and memorialize as  
17 much as you possibly can, but this is a process  
18 and you go out and you talk to people and you  
19 are working with the CFO and you are talking  
20 about an issue and you are -- you know, there  
21 are things that you hope that the people on your  
22 team are getting a feel for and digesting about  
23 the company, and whether that all gets written  
24 down or not, I can't tell you.

25 Q. Is it customary in your

Page 85

1 EDWARD NECARSULMER, III  
2 experience for an underwriter to document  
3 discussions regarding determinations of  
4 materiality?

5 MR. GLUCKOW: Objection to the  
6 form. Vague and ambiguous.

7 You can answer.

8 THE WITNESS: I would say no.

9 BY MR. LEWIS:

10 Q. Why is that?

11 A. Because if, you know, again, you  
12 are determining something is not material, you  
13 probably move on.

14 Q. In your experience, is it  
15 customary to document information which leads to  
16 the decision to exclude something from a  
17 prospectus?

18 MR. GLUCKOW: Object to the  
19 form. Vague and ambiguous.

20 You can answer.

21 THE WITNESS: I'll answer again  
22 no.

23 BY MR. LEWIS:

24 Q. Now, is it customary in the  
25 industry to keep notes regarding a due diligence

22 (Pages 82 to 85)

Page 86

1 EDWARD NECARSULMER, III  
 2 investigation, in your experience?  
 3 A. Again, customary but not  
 4 exhaustive. I mean, anecdotally, you -- someone  
 5 tells you you have currency exposure to some  
 6 kind of currency, so you investigate and you  
 7 find out that in fact the contracts are written  
 8 in dollars -- I mean, I'm making this -- I'm  
 9 using an example -- so therefore I would never  
 10 expect for someone to write down, gee, I checked  
 11 out whether we were exposed to the Zambian  
 12 kwacha and found out the contracts were written  
 13 in dollars. Because we had already reviewed the  
 14 contracts or we had the contracts as another  
 15 part of our thing, I wouldn't have expected that  
 16 to be a separate analysis or separate record.  
 17 Q. Is it your opinion that it is  
 18 desirable for an underwriter to prepare a list  
 19 of facts to be verified and then to address them  
 20 in a systematic fashion?  
 21 A. Desirable? Absolutely.  
 22 Q. What do you believe, as you sit  
 23 here and as you can recall, that the  
 24 underwriters did to investigate possible gray  
 25 marketing or Costco distribution of Adams

Page 87

1 EDWARD NECARSULMER, III  
 2 products?  
 3 MR. GLUCKOW: Objection to the  
 4 form. Overbroad.  
 5 In addition to what's in his  
 6 reports or in summarized reports?  
 7 BY MR. LEWIS:  
 8 Q. As you sit here, can you recall  
 9 anything that Adams did to investigate possible  
 10 gray marketing or Costco distribution of Adams  
 11 products? And if you need to refer --  
 12 THE WITNESS: May I ask a  
 13 question?  
 14 MR. GLUCKOW: Let me object to  
 15 the form. I think you said what did  
 16 Adams do.  
 17 THE WITNESS: Yeah, that's what I  
 18 was going to ask.  
 19 MR. GLUCKOW: Do you want to have  
 20 it read back or fix it?  
 21 MR. LEWIS: I'll fix it.  
 22 BY MR. LEWIS:  
 23 Q. As you sit here, can you recall  
 24 anything that the underwriters did to  
 25 investigate possible gray market distribution or

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1 EDWARD NECARSULMER, III  
 2 Costco distribution of Adams products?  
 3 MR. GLUCKOW: Objection to the  
 4 form.  
 5 You can answer.  
 6 THE WITNESS: They did a number  
 7 of things. They spent time with the  
 8 marketing people at Adams and the  
 9 subject was discussed. They  
 10 participated in the customer survey  
 11 process where that was, to the best of  
 12 my recollection, never mentioned as an  
 13 issue by a group of their -- a group of  
 14 customers.  
 15 BY MR. LEWIS:  
 16 Q. Anything else that you can  
 17 recall?  
 18 A. Those would be the two main  
 19 things that I can recall at this time.  
 20 Q. Incidentally, maybe I can  
 21 short-circuit some paper, you referred in your  
 22 rebuttal report to a number of specific pages at  
 23 Pages 1 and 2 of the rebuttal report --  
 24 A. Mm-hmm.  
 25 Q. -- under underwriting document

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1 EDWARD NECARSULMER, III  
 2 pages, Paragraph B, Paragraph C.  
 3 Am I correct that none of those  
 4 pages specifically referred to the terms gray  
 5 marketing or Costco?  
 6 MR. GLUCKOW: You mean the UND  
 7 document production pages as opposed to  
 8 the deposition transcripts?  
 9 MR. LEWIS: Yes, correct.  
 10 THE WITNESS: I don't recall. I  
 11 can't tell you what said what. I know  
 12 they were both used and -- I can  
 13 certainly tell you in the deposition  
 14 transcripts it came up often. I just  
 15 don't recall.  
 16 MR. LEWIS: Okay, if we may go  
 17 through them.  
 18 BY MR. LEWIS:  
 19 Q. Are you seeking to be qualified  
 20 in this case as an expert on the subject of what  
 21 disclosures were legally required?  
 22 MR. GLUCKOW: Objection to the  
 23 form.  
 24 You can answer.  
 25 THE WITNESS: To the extent that

23 (Pages 86 to 89)



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EDWARD NECARSULMER, III  
it's part of the due diligence  
assignment, I guess the answer is yes,  
but I wasn't specifically -- to the  
best of my knowledge, I'm not  
specifically trying to get there. I  
think that it's all basically the same  
issue to the investigation and I'm sure  
that it was properly disclosed.

BY MR. LEWIS:

Q. But you say in your rebuttal  
report that the defendants made a reasonable  
judgment on disclosure?

MR. GLUCKOW: Where are you  
referring?

MR. LEWIS: The rebuttal report.

MR. GLUCKOW: What page? What  
paragraph?

MR. LEWIS: Let's go to Paragraph  
C. "After doing proper due diligence,  
the underwriters made a reasonable  
judgment related to disclosure of this  
issue."

MR. GLUCKOW: Maybe we are on  
different pages. I'm not finding what

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you are referring to. 322, what  
paragraph?

MR. LEWIS: 3.

MR. GLUCKOW: Oh, he said C.

THE WITNESS: I thought you said  
C, I'm sorry.

BY MR. LEWIS:

Q. Let me read it in full: "To the  
extent that either expert is opining that the  
underwriters were unreasonable in concluding  
that a disclosure regarding gray marketing was  
not necessary, I disagree with that contention  
and believe, that after doing proper due  
diligence, the underwriters made a reasonable  
judgment related to disclosure of this issue."

You do not contend, do you,  
that you are an expert in gray markets?

A. Absolutely not.

Q. Did you ever have experience  
with gray market issues before this litigation?

A. I actually did once. I worked  
on a significant case for Daimler-Benz, and it  
was -- one of the issues they were facing was  
importation of cars not through their regular

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EDWARD NECARSULMER, III  
channels --

Q. Okay.

A. -- and then the dealers would be  
responsible for the cars. And one of the issues  
was dealer relations and, you know, the whole --  
how the US network hung together. So I  
certainly was, you know, involved in that  
particular case, and, you know, we determined  
that it wasn't material to what we were doing,  
but it was out there.

I can't think of others, but I  
suspect there have been others.

Q. When was that Daimler-Benz  
matter?

A. I guess that was a '93  
offering. There were two or three, the rights  
offering and an equity offering and all around  
the -- that offering all around the same time.  
I just remember it being brought up and us  
discussing it and then doing a little research  
on it at the time.

Q. Well, is it your testimony that  
if in this case there was in fact a serious gray  
marketing issue and the underwriters did not

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detect it, they are excused for overlooking it?

MR. GLUCKOW: Objection to the  
form. It assumes facts not in  
evidence. It calls for speculation and  
an incomplete hypothetical. Overbroad.

THE WITNESS: I'd be happy to try  
to answer your question, I'm just not  
sure I can.

BY MR. LEWIS:

Q. Well, let's take the  
hypothetical assumption that -- not so  
hypothetical -- that there was a serious  
potential problem that existed, that the  
underwriters conducted the investigation -- let  
me reframe it.

Are you saying anything by your  
opinion other than if the underwriters did a  
diligent investigation, they were not required  
to disclose something they didn't find?

MR. GLUCKOW: The same objections.

THE WITNESS: I fundamentally  
agree with that, yes.

BY MR. LEWIS:

Q. Your opinion does not rest on

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